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IN THE

# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1940

**No. 28**

HERTHA J. SIBBACH,
*Petitioner,*

*vs,*

WILSON & COMPANY, INC.
*Respondent.*

## SUPPLEMENTAL BRIEF OF PETITIONER.

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## SUMMARY OF ARGUMENT.

1. The limitation in the Rules Enabling Act. (Supplementing Point II, A, pp. 18-47, Brief in Support of Petition.)

2. The questions of policy involved in the adoption of Rule 35 indicate the substantive character of the right modified by the rule. (Supplementing Point II, C, pp. 39-44, Brief in Support of Petition.)

3. The law of Indiana does not furnish authority for the order. (Supplementing Point IV, pp. 51-54, Brief in Support of Petition.)

## ARGUMENT.

This brief supplements the argument in Petitioner's Brief in Support of Petition for Writ of Certiorari by the addition of authorities not cited in the earlier brief.

### 1. The Limitation in the Rules Enabling Act.

(Supplementing Point II, A, pp. 18-47, Brief in Support of Petition.)

Petitioner's analysis of the limitation in the Rules Enabling Act[1] is the same as that of the late Thomas W. Shelton. From 1912 to 1929 Shelton was the chairman[2] of a committee of the American Bar Association that urged that the Supreme Court be given power by statute to adopt rules of civil procedure for actions at law. In writing of a bill[3] that had almost the same text as the Rules Enabling

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[1] Act of June 19, 1934, c. 651, secs., 1, 2 (48 Stat. 1064; 28 U.S.C. 723b, 723c), quoted in full in Petitioner's Brief in Support of Petition, p. 11.

[2] It has been said that Shelton "should be named first in the long list of those who distinguished themselves by persistent devotion to the great cause" of giving the Supreme Court power to make rules for actions at law. (1938) 24 A.B.A.J. 99, in an article setting forth the history of the American Bar Association's effort to obtain this power for the Supreme Court.

[3] Introduced in the Senate (69th Cong. 1st Sess.) in December, 1925 as S. 477. The bill sponsored by the American Bar Association in prior years contained only one sentence (see text of H.B. 26462 introduced on December 2, 1912, reproduced in (1938) 24 A.B.A.J. 101). In 1925 the bill was changed by adding what is now the second sentence—the limitation clause—of the Rules Enabling Act and by adding also what is now Section 2 of the Rules Enabling Act giving the Supreme Court power to unite the rules in cases in equity with those in actions at law. There are two minor verbal differences between the 1925 bill and the Rules Enabling Act.

Act, Shelton emphasized that it would "necessitate no alteration of the present procedure upon any jurisdictional or fundamental matter" and stated that this "simple statute" embodied the following principles underlying the rule-making power:[4]

> * * * "The principle underlying rules of court is the organic one of an equable division of power between the legislative and judicial department of government. It is the very spirit of the Constitution. The program of the American Bar Association proposes to divide all judicial procedure into two classes, viz.:
>
> (a) jurisdictional and fundamental matters and general procedure and
>
> (b) the rules of practice directing the manner of bringing parties into court and the course of the court thereafter.
>
> The first class, of which we shall speak presently, goes to the very foundation of the matter and may aptly be denominated the *legal machine* through which justice is to be administered, as distinguished *from the actual operation thereof,* and lies exclusively with the legislative department of government. It prescribes what the courts may do, who shall be the parties participating, and fixes the rules of evidence and all important and permanent matters of procedure. The second class concerns only the practice, the manner in which these things shall be done, that is, the details of their practical, mechanical operation. Concisely stated the first class provides what the courts *may* do, which power should be by the Legislative Department, while the second regulates *how* they shall do it, which should be within the control of the presiding judges and lawyers."

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[4] Supplement to March, 1927, A.B.A.J. 5, in an article entitled "*The Philosophy of Rules of Court,*" one of a series of articles by eminent lawyers on the rule-making power of the courts (1927) 13 A.B.A.J. following p. 172.

A report of the Committee on the Judiciary of the United States Senate, in recommending the passage of the 1925 bill written about by Shelton, analyzed the bill in language very similar to that of Shelton.[5] Of the rule-making power granted by the bill, the report said:[6]

> "Where a doubt exists as to the power of a court to make a rule, the doubt will surely be resolved by construing a statutory provision in such a way that it will not have the effect of an attempt to delegate to the courts what is in reality a legislative function. And it is inconceivable that any court will hold that rules which deprive a man of his liberty . . . are merely filling 'up the details', even though they relate to remedial rights."

Both Shelton and the report of the Senate committee attributed real meaning to the limiting words, "Said rules shall neither abridge, enlarge, nor modify the substantive rights of a litigant." Neither took the position that the words were surplusage, or that they meant only that the rules should not deal with the rights determined by the final judgment in the litigation. Both considered the Rules Enabling Act from the standpoint of the function of the rule-making power and avoided the troublesome criteria of "procedure" and "substantive law." Shelton included "important and permanent matters of procedure" in his first class of matters not within the rule-making power.

Petitioner's analysis of the rule-making power is also supported by the views of two writers—Thomas F. Green and Charles A. Riedl—in recent articles[7] entitled "To

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[5] Sen. Rep. No. 1174, 69th Cong., 1st Sess., (1926) 12. At pp. 9-12, the report is devoted to a discussion of the heading, "The Bill does not attempt to affect substantive rights or remedies."

[6] *Id.* p. 11.

[7] Both articles were submitted in the 1940 Ross Essay Competition of the American Bar Association. Green, (1940) 26 A.B.A.J. 482; Riedl, *id.* 601.

What Extent May Courts Under the Rule-Making Power Prescribe Rules of Evidence?" Both writers look to the function of the rule-making power as furnishing the criteria to be followed in deciding what is within the rule-making power. Both conclude that a rule of evidence is not within the rule-making power if it involves an important question of public policy. Mr. Green says[8] of the distinction between procedure and substantive law:

> "The borderline must remain shadowy. Its location will vary somewhat according to the purpose of the classification. When the rule-making power is being defined, the distinction between procedure and substance is drawn for the purpose of giving the judiciary a legislative control of *judicial machinery but not of individual rights.* The distinction cannot be based entirely on the etymology of the two words nor altogether on the meaning given them for other purposes by decided cases. If the court or the legislature recognizes a vested interest of litigants in the particular rule of evidence, the rule is not an adjective precept but an independent right and should not be controlled by rule of court." (Italics supplied.)

He also says that rules of evidence should be held *prima facie* to be procedure *"unless some pressing public policy requires otherwise."* Mr. Ried! says:[9]

> "In establishing the standard within which the court may prescribe rules of evidence under the rule-making power, we should not become slaves to the terms 'substantive law' and 'procedural law.' . . . it is now impossible to determine what is meant by the terms 'substantive law' and 'procedural law.' We therefore do not hesitate to abandon these terms. . . .
>
> " . . . The norm is not whether the rule is enforced as a rule of procedure, but rather whether the rule

[8] *Id.* 484.
[9] *Id.* 604.

creates a non-procedural policy. *If the rule is an expression of general public policy, then it can be prescribed only by the legislature.*" (Italics supplied.)

Thus, even though the content of Rule 35a of the Federal Rules of Civil Procedure may be classified as matter of procedure, it is nevertheless invalid under the Rules Enabling Act if it deals with a "fundamental matter," with "what the courts may do" rather than with "how they shall do it"; if there is a "pressing public policy" that operates against the rule; or if the rule deals with a matter of "general public policy."

In the instant case the opinion of the Circuit Court of Appeals does not attempt to analyze the meaning of the Rules Enabling Act. This is likewise true of the opinion of the Court of Appeals for the District of Columbia in the recent case of *Beach* v. *Beach*,[10] where it was held (Judge Stephens dissenting) that Rule 35a is valid under the Rules Enabling Act. This is likewise true of statements about the Rules Enabling Act in the opinion in *Sampson* v. *Channell*.[11] In language that was unnecessary to the decision of the case, Judge Magruder there said (p. 756) that there is "a twilight zone between the two categories (of procedure and substantive law) where a rational classification could be made either way" and where the Supreme Court under the Rules Enabling Act would have power to prescribe a so-called rule of procedure for the federal courts. Judge Magruder also intimated (p. 757, n. 7) that the terms "practice and procedure" and "substantive rights" were ambiguous and said that, if the Supreme Court adopts a rule in a borderline case, "the courts properly are inclined to adopt the construction put upon the language (of the Rules Enabling

[10] Decided June 28, 1940, No. 7559; 3 Fed. Rules Serv. 35a.5, Case 2, not yet published in Federal Reporter.

[11] 110 F. (2d) 754 (C.C.A. 1st, 1940), *cert. denied* June 3, 1940, 60 S. Ct. 1099.

Act) by the agency charged with carrying out the statute", and that this would be particularly true when the agency happens to be the Supreme Court of the United States. The *Sampson* case did not require an interpretation of the Rules Enabling Act. The reasoning of Shelton and the other authorities cited above, as well as that in Petitioner's Brief in Support of Petition, tends to clarify for the instant case any seeming ambiguity in the Rules Enabling Act and to dispel any "twilight zone" between substance and procedure that the Act may be thought to create.

**2. The questions of policy involved in the adoption of Rule 35 indicate the substantive character of the right modified by the rule.**

(Supplementing Point II, C, pp. 39-44, Brief in Support of Petition.)

Petitioner's contention that the adoption of Rule 35a required the determination of important questions of policy is supported by the conclusions of Charles A. Riedl in the article already cited. As noted above, Mr. Riedl says that the criterion to apply in deciding whether or not a matter is within the rule-making power is to determine "whether the rule creates a non-procedural policy." To illustrate the criterion, he applies it to twenty proposals made by the American Bar Association's Committee on Improvements in the Law of Evidence.[12] Mr. Reidl lists[13] the proposals and states in each case whether or not the proposal affects "general public policy" and whether it is a matter for the court or the legislature to adopt. Proposal number four of the American Bar Association Committee is the adoption of the Uniform Expert Testi-

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[12] The proposals are set forth in *Report of the Committee on Improvements in the Law of Evidence*, (1938) 63 A.B.A. Rep. 570, at pp. 581-597.

[13] (1940) 26 A.B.A.J. 605.

mony Act[14] prepared by the National Conference of Commissioners on Uniform State Laws. Portions of this proposed Act are similar to Rule 35a of the Federal Rules of Civil Procedure. Section 5 of the Uniform Act provides, among other things, for the making of a physical examination of the person by a court-appointed expert. Mr. Riedl concludes that the Uniform Expert Testimony Act is an expression of "general public policy" and that therefore it should be adopted by legislative enactment rather than by rule of court. He reaches the same conclusion about the American Bar Association Committee's tenth proposal, which urges the psychiatric examination of the complaining witness in sex-offense cases.[15]

In determining whether or not a rule of court involves general public policy, it has been suggested that the attitude of the courts of the state in which the federal court is sitting should be given great weight. The suggestion is made by Judge Charles E. Clark of the Circuit Court of Appeals for the Second Circuit. Judge Clark, who was Reporter to the Advisory Committee that assisted this Court in preparing the Federal Rules of Civil Procedure, recently said:[16]

> ". . . A rule, which obviously has some effect upon substantive rights and just as obviously has to do with the manner in which the case is brought before and presented to the courts, does affect both substance and procedure, and . . . we cannot decide in which

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[14] The text of the proposed Act appears in (1938) 63 A.B.A. Rep. 598-600.

[15] These conclusions are reached by Mr. Riedl with full knowledge of the fact that this court adopted Rule 35a of the Federal Rules of Civil Procedure. See (1940) 26 A.B.A.J. 605, n. 30.

[16] (1940) 8 Geo. Wash. L. Rev. 1238, in an article entitled *"Procedural Aspects of the New State Independence."*

category it must go for present purposes without weighing other matters of policy. *May it not be sound . . . to try to ascertain how strongly substantive the rule is regarded in the state itself, by its legislature and courts?''* (Italics supplied.)

As already pointed out by petitioner,[17] the decisions of the Illinois courts reveal a strong policy against compelling physical examinations. The cases go so far as to hold, not merely that the courts do not have power to order a physical examination, but that the plaintiff may not be asked at the trial about his or her willingness to submit to the examination.

**3. The law of Indiana does not furnish authority for the order.**

(Supplementing Point IV, pp. 51-54, Brief in Support of Petition.)

That a federal court may rightly apply some of the law of the state in which the court is sitting, rather than the law of the state where the tort occurred, is apparent from the recent holding in *Sampson* v. *Channell.*[18] In that case an alleged tort occurred in the State of Maine and the trial was in a federal district court sitting in Massachusetts. The Maine law imposed on the plaintiff the burden of proving his freedom from contributory negligence. The Massachusetts law imposed the burden on the defendant. The Circuit Court of Appeals held that the Massachusetts rule should be followed. The opinion said that the incidence of burden of proof was a substantive matter in applying the rule of *Erie R. Co.* v. *Tompkins*, 304 U. S. 64 (1938), and that a state rule should therefore be followed. But from the standpoint of *what* state law should be fol-

[17] Petitioner's Brief in Support of Petition for Writ of Certiorari, 13-15.

[18] Cited above, note 11.

lowed, the opinion said that the matter was procedural and that, since a Massachusetts state court would apply its own law as to incidence of burden of proof when the tort occurred in Maine, the federal court sitting in Massachusetts should apply the Massachusetts law.

So in the case at bar, even though Rule 35a is invalid because it modifies a substantive right of the plaintiff, a federal court sitting in Illinois may not order a physical examination because the alleged tort occurred in Indiana where the state courts may have that power. On the question of whether the Indiana or Illinois law governs, the ordering of a physical examination is a procedural matter; and the federal court sitting in Illinois follows the Illinois law.

Respectfully submitted,

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